

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

J. D. JONES BARTON,

Petitioner,

v.

PATRICK R. GLEBE,

Respondent.

No. C10-5511 RJB/KLS

ORDER DENYING MOTION FOR
RECONSIDERATION

Before the court is Petitioner's motion for reconsideration of the court's Order (Dkt. 6) denying petitioner's request for the appointment of counsel. Dkt. 13. Having considered the motion, the court finds that it should be denied.

DISCUSSION

Motions for reconsideration are disfavored and will ordinarily be denied in the "absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to the court's attention earlier with reasonable diligence." Local Rule CR 7(h)(1). Mr. Barton has identified no error in the court's Order, nor presented any new facts or legal authority to suggest reconsideration is appropriate.

Mr. Barton complains that he requires counsel to assist in the compilation of the state court record and in an evidentiary hearing. However, the state court record has not yet been

1 submitted by Respondent and the court has not yet determined whether an evidentiary hearing is
2 necessary.

3 **A. Evidentiary Hearing**

4 The decision to hold a hearing is committed to the court's discretion. *Williams v.*
5 *Woodford*, 306 F.3d 665, 688 (9th Cir. 2002). The petitioner bears the burden of showing the
6 need for a hearing. *Pulley v. Harris*, 692 F.2d 1189, 1197 (9th Cir. 1982), rev'd on other
7 grounds, 465 U.S. 37 (1984); *Baja v. Ducharme*, 187 F.3d 1075 (9th Cir. 1999). An evidentiary
8 hearing is not required unless the petitioner alleges facts which, if proved, would entitle him to
9 relief. *Townsend v. Sain*, 372 U.S. 293, 312 (1963). The petitioner must produce some evidence
10 demonstrating the existence of a genuine question of material fact. *Morris v. State of California*,
11 966 F.2d 448, 454-55 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992) (Wishful suggestions
12 cannot substitute for declaratory or other evidence.) A hearing is not required if the claim
13 presents a purely legal question, or if the claim may be resolved by reference to the state court
14 record. *Campbell v. Wood*, 18 F.2d 662, 679 (9th Cir.) (en banc), cert. denied, 114 S. Ct. 2125
15 (1994).

16 The petition has been served, but the time for filing Respondent's answer and the time for
17 the court's review of the petition has not yet passed. Accordingly, it has not yet been determined
18 whether the claims presented by Petitioner may be resolved solely by reference to the state court
19 record. Therefore, Petitioner's request for an evidentiary hearing is denied at this time.

20 **B. State Court Record**

21 Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court's
22 power to upset a state court's adjudication of a criminal case is very limited. A federal court
23 shall not grant a habeas petition with respect to any claim adjudicated on the merits in the state
24

1 courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved
2 an unreasonable application of, clearly established federal law, as determined by the Supreme
3 Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts
4 in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d). A determination of a
5 factual issue by a state court shall be presumed correct, and the applicant has the burden of
6 rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. §
7 2254(e)(1).
8

9 Rule 5(c) of the rules governing § 2254 cases provides that the respondent shall indicate
10 in the answer to a habeas petition what transcripts are available and what proceedings have been
11 recorded but not transcribed. The State must attach to its answer any parts of the transcript it
12 deems relevant. Once this is done, the court, on its own motion or upon request of the petitioner
13 may order that further portions of the existing transcripts be furnished or that certain portions of
14 the non-transcribed proceedings be transcribed and furnished. Rules Governing Section 2254
15 Cases in the U.S. Dist. Cts., 28 U.S. C. Pt. VI, ch. 153, Rule 5 (emphasis added); *Simental v.*
16 *Matrisciano*, 363 F.3d 607, 612 (7th Cir. 2004). As noted by the *Simental* court, on habeas
17 review, except in limited circumstances, the district court does not make independent factual
18 determinations. *Id.* citing 28 U.S.C. § 2254(e); *United States ex rel. Green v. Greer*, 667 F.2d
19 585, 586 (7th Cir. 1981) (an examination of a record is not required if the petitioner fails to
20 identify any incompleteness or inaccuracies in the facts before the district court.)
21

22 The Ninth Circuit's holding in *Richmond v. Ricketts*, 774 F.2d 957 (9th Cir. 1985),
23 requiring that the district court examine all relevant parts of the state court record, is not
24 inconsistent with these holdings or Rule 5. Under Rule 5, the determination of relevance is left
25 to the discretion of the respondent. A demand for further documentation can only be executed
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1 by court order *sua sponte* or by request of the petitioner. § 28 U.S.C.A. 2254, Rule 5, Advisory
2 Committee Notes, 1976 Adoption. Upon such a request the burden is placed on the petitioner to
3 prove to the court that the excluded materials requested are relevant and necessary. When a
4 dispute concerning relevance arises, the burden is on the petitioner to prove to the court that the
5 excluded materials are necessary for the petition. *Richmond v. Ricketts*, 640 F.Supp. 767 (Ariz.
6 1986).

7
8 After Respondent has answered and submitted the relevant state court record and
9 assuming Petitioner finds that record to be deficient, then 28 U.S.C. § 2254(f) provides that the
10 burden shifts to Petitioner to produce those parts of the record pertinent to his claims. That
11 subsection further states that if the Petitioner, because of indigency or other reason is unable to
12 produce such part of the record, then the State shall do so and the court shall direct the State to
13 do so by order directed to an appropriate State official. *Id.* The subsection further provides that
14 if any of the pertinent record cannot be provided, the court shall determine under the existing
15 facts and circumstances what weight shall be given to the State court's factual determination. *Id.*

16
17 Accordingly, it is **ORDERED**:

18 (1) Petitioner's motion for reconsideration and requests for evidentiary hearing and
19 expansion of the record (Dkt. 13) are **DENIED**;

20 (2) The Clerk shall send a copy of this Order to Petitioner and to counsel for
21 Respondent.

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23 DATED this 30th day of August, 2010.

24
25 
26 Karen L. Strombom
United States Magistrate Judge